NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NORTHERN INSURANCE CO. OF NEW YORK, Plaintiff - Appellee, v. SHANE KALEO HIRAKAWA, et al., Defendants - Appellants, and, DEBORAH KUBO, et al., Defendants.	No. 02-15623* D.C. No. CV-01-00007-SPK(BMK) MEMORANDUM**

* The parties have stipulated to the consolidation of Case Nos. 02-15623 and 02-15630 for purposes of this appeal.

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

NORTHERN INSURANCE CO. OF NEW YORK, Plaintiff - Appellee, v. SHANE KALEO HIRAKAWA, et al., Defendants, and, DAENA M.L. SHIGEMURA, et al., Defendants - Appellants.	No. 02-15630 D.C. No. CV-01-00007-SPK(BMK)

Appeal from the United States District Court
for the District of Hawaii
Samuel P. King, District Judge, Presiding

Argued and Submitted June 10, 2003
San Francisco, California

Before: T.G. NELSON and HAWKINS, Circuit Judges, and ZILLY, District Judge.[***]

Appellants Shane Hirakawa, Herman Kapiioho, Gwendolyn Kapiioho, Daena M.L. Shigemura, and Cindy Tamura, as Next Friend of Daena M.L. Shigemura, a minor, appeal the district court's grant of summary judgment in

[***] Honorable Thomas S. Zilly, United States District Judge for the Western District of Washington, sitting by designation.

favor of Appellee Northern Insurance Co. on its declaratory judgment action seeking a declaration that it did not owe a duty to defend or indemnify its insureds for claims brought in an underlying personal injury action.

Appellee's insurance policy covers claims for bodily injury "caused by an 'occurrence,'" and defines "occurrence" as an "accident." Under Hawaii law, "if the insured did something or . . . failed to do something, and the insured's expected result of the act or omission was the injury, then the injury was not caused by an accident and therefore not an occurrence." Hawaiian Ins. & Guar. Co. v. Blanco, 804 P.2d 876, 880 (Haw. 1990), *overruled in part on other grounds by* Dairy Road Partners v. Island Ins. Co., 992 P.2d 93 (Haw. 2000).

The insured has the burden of establishing coverage under an insurance policy. Sentinel Ins. Co. v. First Ins. Co. of Haw., Ltd., 875 P.2d 894, 909 n.13 (Haw. 1994). An "insurer may only disclaim its duty to defend by showing that *none* of the facts upon which it relies might be resolved differently in the underlying lawsuit." Dairy Road Partners, 992 P.2d at 117.

A genuine issue of material fact exists regarding whether Shane Hirakawa intended to hit Daena Shigemura and cause injury. Appellants submitted evidence from Dr. Matthews who stated that Shane Hirakawa was "psychotic at the time of the attack" and "out of touch with reality." In the underlying personal injury

action, Shane Hirakawa testified at his deposition that he had no idea why he wanted the sword, and had no plan concerning the sword.

Hawaii law clearly establishes that whether an injury is an accident is determined from the perspective of the insured. AIG Haw. Ins. Co. v. Estate of Caraang, 851 P.2d 321, 328-29 (Haw. 1993); Blanco, 804 P.2d at 880. Shane Hirakawa's deposition testimony, Dr. Matthews's testimony, and the inferences drawn therefrom prevent the court from conclusively establishing as a matter of law that Shane Hirakawa intended to hit Daena Shigemura and cause injury.

The district court erred in finding that there was no genuine issue of material fact regarding whether Shane Hirakawa intended to hit Daena Shigemura and cause bodily injury. The district court's grant of summary judgment was therefore improper.

REVERSED and REMANDED.